



Center for Biological Diversity

*protecting and restoring natural ecosystems and imperiled species through
science, education, policy and environmental law*

VIA FACSIMILE and CERTIFIED MAIL

September 8, 2003

Chief, Marine Mammal Division
Attn: ZMRG
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910
Fax: 301-713-0376

RE: Comments on Advanced Notice of Proposed Rulemaking for the Definition of the MMPA's Zero Mortality Rate Goal.

Dear Sir or Madam:

On behalf of the Center for Biological Diversity and the Turtle Island Restoration Network, I submit the following comments regarding the Advanced Notice of Proposed Rulemaking for the Definition of the MMPA's Zero Mortality Rate Goal ("ZMRG"). 68 Fed.Reg. 40888. First and foremost, while we may not agree with any of NMFS's proposed definitions, we support NMFS's efforts to define ZMRG. While we believe that the ZMRG threshold as currently determined in the annual Stock Assessment Reports ("SARs") (i.e. 10% of PBR) is legally enforceable, it is preferable to have the term defined by regulation. In drafting these comments, we interpret this proposed rulemaking as limited to defining ZMRG as used in Sections 101(a)(2) and 118 of the MMPA. We do not see this rulemaking as having any bearing on the implementation of the International Dolphin Conservation Program (MMPA Sections 301 through 307).

In the Advanced Notice of Proposed Rulemaking ("ANPR"), NMFS frames the process of determining whether or not commercial fisheries have attained ZMRG as a two part inquiry. First NMFS seeks to determine (or define) an "insignificance threshold" (T_{ins}) for a given stock; second NMFS considers whether when reducing mortality and serious injury below T_{ins} is not "within the feasible economics" of the fishery, if NMFS can still declare a given fishery at ZMRG. As discussed below, we believe that this is an improper way to frame the issue. Mortality and serious injury to marine mammal stocks must not only reach "insignificant levels" (T_{ins}), they must also "approach zero." Further, the statute clearly requires that fisheries "shall" reach ZMRG by April 30, 2001; such a command leaves no room for consideration of the "feasible economics" of a given fishery.

Legal Significance of ZMRG

The MMPA mentions ZMRG in several places (e.g. Sections 101(a)(2), 118(a)(1), 118(b),
Tucson • Phoenix • Silver City • Idyllwild • San Diego • Berkeley • Sitka

Brendan Cummings, Staff Attorney
PO Box 493 • Idyllwild, CA • 92549

T: (909) 659-6053 x. 301 • F: (909) 659-2484 • bcummings@biologicaldiversity.org

18(f)(2)). The most explicit command regarding ZMRG is at Section 118(b)(1):

Commercial fisheries shall reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate within 7 years after [April 30, 1994].

This command is unequivocal. Courts have repeatedly held that “shall means shall.” See Brower, et al., v. Evans, et al., 257 F.3d 1058, 1068 n.5 (9th Cir. 2001)(MMPA case holding use of the term “shall” has mandatory effect: “‘Shall’ means shall.” Center for Biological Diversity v. Norton, 254 F.3d 833, 2001 U.S. App. LEXIS 13736, 2001 WL 687008, at *4 (9th Cir. 2001) (quoting Forest Guardians v. Babbitt, 174 F.3d 1178, 1187-88 (10th Cir. 1999)); see also United States v. Monsanto, 491 U.S. 600, 607, 105 L. Ed. 2d 512, 109 S. Ct. 2657 (1989) (by using ‘shall’ ‘Congress could not have chosen stronger words to express its intent that forfeiture be mandatory’)).

Despite this clear command from Congress, in the ANPR, NMFS states that “a first option would be to accept the statement in MMPA section 118(b)(1) that fisheries shall reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate.” This is not just one “option” among several that NMFS can “accept.” This is the unambiguous command of the statute. NMFS simply cannot rewrite the statute via regulation or policy to turn a “shall” into a “may.” NMFS’s second “option” in which a fishery could be declared at ZMRG even if it exceeded T_{ins} is not an option at all; Section 118(b)(1) requires all fisheries to reduce mortalities to “insignificant levels.” To define ZMRG such that mortality and serious injury to a marine mammal stock could exceed “insignificant levels” would directly conflict with the statute and would therefore likely be struck down by a reviewing court. NMFS of course is required to take the economics of a fishery and available technologies into account in figuring out how to reduce mortality and serious injury to insignificant levels, but NMFS cannot use these factors as an excuse not to reach such levels.¹

Defining “Insignificant Levels”

In the ANPR, NMFS proposes three options for defining T_{ins} : 1) 10% of PBR; 2) 10% delay in recovery; and 3) 0.1% N_{min} (cetaceans) and 0.3% N_{min} (pinnipeds). As mentioned above the MMPA requires not just “insignificant levels” of mortality and serious injury to marine mammal stocks, but also that such take be at rates “approaching zero.” Nowhere in the ANPR does NMFS attempt to include the “approaching zero” requirement into any of the proposed definitions of ZMRG. As such, each of the

¹In the event NMFS considers economic and technical feasibility in its determination of whether a given fishery has reached ZMRG, NMFS can in no instance claim that reducing mortality and serious injury below T_{ins} is not feasible for a given fishery if NMFS has never even convened a take reduction team for that fishery. As it currently stands, several Category I and most Category II fisheries are not subject to an operative take reduction plan. Similarly, allowable mortality and serious injury under such a scenario could never be greater than current rates (or rates in 1994 when the MMPA Amendments were enacted) as such rates are by definition feasible.

proposed definitions is inadequate as a matter of law. A similar unlawful regulatory construction of the MMPA was recently struck down by a court. See NRDC v. Evans, 232 F.Supp.2d 1003, 1023 (N.D. Cal 2002) (holding NMFS regulation at 50 C.F.R. § 216.103 facially invalid as it conflates separate statutory requirements of MMPA Section 101(a)(5) for permit issuance of “small numbers” and “negligible impact” into a single requirement).

Putting aside for a moment the failure to address the “approaching zero” prong of ZMRG, Option 1 (10% of PBR) is the preferable option for defining T_{ins} as it is the only option that is compatible with various other statutory and regulatory provisions of the MMPA. As noted in the ANPR, Option 1 also has the advantage of being familiar to NMFS’s continuants as it is the same as the proposed definition of ZMRG in the initial NMFS rulemaking to implement the 1994 amendments to the MMPA. (60 Fed.Reg. 31666). It is also the current de facto definition of ZMRG used in the SARs. Additionally, and most importantly, it is tied to the statutory defined role of PBR. Section 118(f)(2) makes the “short-term goal” of a take reduction plan (“TRP”) to reduce mortality and serious injury of a marine mammal stock to below PBR within six months, and the “long-term goal” of the TRP to reduce such take to ZMRG within five years. Defining ZMRG (or at least T_{ins}) in relation to PBR is most compatible with this statutory scheme. Moreover, if T_{ins} is defined as 10% of PBR, the effectiveness of a TRP in reaching T_{ins} is easy to measure; once the TRP reduces mortality and serious injury to below PBR within the first six months of the TRP’s operation, a further 10% reduction in mortality and serious injury over each successive six month period will reduce such take to 10% of PBR over the five-year life of the plan (i.e. mortality and serious injury is at or below 90% of PBR after the first year of the TRP, 70% of PBR after the second year of the TRP, 50% of PBR after year three, 30% of PBR after year four, and 10% of PBR after year five).²

In the ANPR, NMFS claims that a downside of Option 1 is that it leads to “overly conservative levels of protection for certain endangered species.” This is hardly a downside. Given NMFS’s obligations under Section 2(c) and 7(a)(1) of the ESA to “conserve” listed species, and the Supreme Court’s admonition that endangered species are to be afforded the “the highest of priorities.” T.V.A. v. Hill, 437 U.S. 153, 174 (1978), an endangered species can never be deemed to have too much protection. Moreover, the MMPA is replete with provisions requiring ESA-listed species to receive additional protection. See e.g. Sections 3(1)(C), 3(19)(B)&(C), 101(a)(5)(E), 118(d)(4)(A). By tying T_{ins} to PBR, endangered and threatened species get the additional protection they deserve under the MMPA. Eliminating this, as both Options 2 and 3 do, would run counter to both the ESA and the

²The five-year timeframe from the adoption of a TRP to the reaching of ZMRG comes from Section 118(f)(2). The only way to read this provision in harmony with the provision at Section 118(b)(1) for all fisheries to have reached ZMRG by April 30, 2001 is that the five-year step-down reduction in take under a TRP was to have been completed by April 30, 2001 (i.e. started no later than April 30, 1996). However, since NMFS missed most of the statutory deadlines for implementing TRPs, and for many fisheries has yet to initiate the TRP process, compliance with the April 30, 2001 deadline is now impossible. The appropriate remedy for NMFS’s (and numerous fisheries’) failure to reach ZMRG by the Congressional deadline is beyond the scope of this letter.

MMPA.

Options 2 and 3 for determining T_{ins} should not be further considered by NMFS as they conflict with the MMPA in several respects. The ANPR highlights that both of these options are easy to calculate as they are the equivalent of the PBR equation using a recovery factor of 0.1 or 0.05 respectively for all stocks. No distinction is made for threatened or endangered stocks, or for populations that are of unknown status or declining. The statutory definition of PBR however explicitly requires calculation using a recovery factor of between 0.1 and 1.0. Section 3(20)(C). The statute requires this because of the reality that different stocks, depending on their status, are affected by increased human-caused mortality in different ways. In other words, a stock that is increasing in numbers may be able to suffer a certain level of human-caused mortality without impairment of recovery or “significant” population level effects, while the same level of mortality inflicted upon a declining stock could greatly exacerbate the decline and therefore clearly not be at “insignificant levels.” By defining T_{ins} as a function of PBR, Option 1 builds in the distinction between endangered, threatened, declining, stable, or increasing stocks that the variable recovery factor in the PBR definition reflects. By using a non-variable recovery factor in calculating T_{ins} , Options 2 and 3 improperly and illegally nullify the distinction the MMPA creates in the treatment of stocks of different status.

Option 2 is also illegal in that it renders portions of Section 118(f) superfluous. As mentioned above, Section 118(f)(2) makes the “short-term goal” of a TRP to reduce mortality and serious injury of a marine mammal stock to below PBR within six months, and the “long-term goal” of the TRP to reduce such take to ZMRG within five years. Under Option 2, T_{ins} equals PBR for endangered species. Assuming NMFS considers take at or below T_{ins} to be at ZMRG,³ then a fishery that takes endangered species would, once it reached PBR in the first six months of a TRP, also be considered at ZMRG, and the remaining four and a half years of the TRP would be meaningless. This is not the result Congress intended. Given that under a TRP, a fishery must reduce mortality and serious injury to below PBR in the first six month of the plan’s operation, yet the fishery has another four and a half years to reach ZMRG, ZMRG, however calculated, must be substantially below PBR, not its equal.⁴

An additional flaw with Option 2 is that it uses the same formula to determine T_{ins} that NMFS already uses to determine “negligible impact” under section 101(a)(5)(E). See 65 Fed.Reg. 64670 (Permit for take of three endangered whale species by CA/OR Drift Gillnet Fishery in which NMFS determines that “negligible impact” equals PBR for species with a recovery factor of 0.1). While we do not agree with NMFS’s interpretation of “negligible impact” as set forth in that permit, it is a well established canon of statutory construction that different terms in a statute should be interpreted to have

³Again, from the ANPR, NMFS seems to be treating T_{ins} and ZMRG as equivalent. While we believe that T_{ins} is an important part of ZMRG, reaching T_{ins} is only half the goal; mortality and serious injury still need to be reduced to a rate “approaching zero” before ZMRG can be met.

⁴For this same reason, Option 3 which sets T_{ins} for endangered species at 50% of PBR is also at odds with the statute.

different meanings. The terms “insignificant levels” and “negligible impacts” in the MMPA must be interpreted to have separate and distinct meaning. Option 2 would make these definitions identical.

A final flaw with Options 2 and 3 is that they are incompatible with the current definitions of Category I, II and III fisheries contained in the MMPA and the regulations at 50 C.F.R. § 229.2. As the definition of the three fisheries categories is tied to percentages of PBR, if ZMRG is also defined in terms of PBR (as in the current de facto definition of 10% of PBR), a determination of progress towards ZMRG can be made by simply looking at the annual List of Fisheries. In other words, Category III fisheries can be considered to be at ZMRG⁵ while Category I and II fisheries are by definition not at ZMRG. Under Options 2 and 3 however, a fishery could be placed in Category I because of levels of take greater to or equal to 50% of a stock’s PBR, yet if the stock killed or injured by the fishery is an endangered species (i.e. has a recovery factor of 0.1), the fishery could still be considered to have reached ZMRG if take is less than or equal to PBR. This is nonsensical; if by definition a fishery has “frequent incidental mortality and serious injury of marine mammals” (the Category I definition), that fishery cannot rationally be said to have incidental mortality and serious injury at “insignificant levels approaching a zero” rate. Numerous Category II fisheries would also improperly be classified as having reached ZMRG under these two options.⁶

In sum, the only option of the three that NMFS is considering for defining “insignificant levels” or T_{ins} that is compatible with the MMPA, as well as with the ESA, is Option 1 which sets T_{ins} as 10% of PBR. While we believe that this may be an appropriate definition for “insignificant levels,” we do not believe that T_{ins} is the same as ZMRG. A complete definition of ZMRG must also incorporate the “approaching zero” language of the statute.

Defining “Approaching Zero”

As repeatedly mentioned above, the MMPA requires not only that fisheries reduce incidental mortality and serious injury of marine mammals to “insignificant levels,” but also that such injury and mortality be reduced to a rate “approaching zero.” Section 118(b)(1). The MMPA is concerned not only with marine mammal populations, but also with the health and welfare of individual marine mammals. As such, the MMPA not only seeks to reduce mortality and serious injury of marine mammals to biologically insignificant levels, but also to reduce such mortality in absolute terms. In this context, the “insignificant levels” prong of ZMRG may be interpreted as protecting marine mammal

⁵This assumes that NMFS actually follows the MMPA and its own regulations and properly classifies fisheries in the List of Fisheries. Unfortunately, for many marine mammal-killing fisheries this is not the case, as NMFS improperly lists them as Category III in the face of ample evidence that they should be listed in Category I or II. Additionally, considering all Category III fisheries to be at ZMRG only works if ZMRG equals T_{ins} and the “approaching zero” prong of ZMRG is given no effect.

⁶Conversely, under Option 3 certain Category III fisheries would have levels of take above T_{ins} and therefore not be at ZMRG.

populations, while the “approaching zero” prong is read as protecting individual marine mammals by reducing mortality and serious injury to the lowest possible levels.

In many instances, particularly with stocks with relatively large populations, T_{ins} may be a very large number. For example, using a T_{ins} of 10% of PBR, 549 Western North Atlantic harbor seals, 833 California sea lions, 366 short-beaked common dolphins, 157 Dall’s porpoise, and 1,616 Northern fur seals, plus many hundreds of other marine mammals, could be killed on an annual basis without exceeding T_{ins} .⁷ If NMFS ignores the “approaching zero” prong of ZMRG and simply equates T_{ins} with ZMRG, up to 5621 marine mammals could lawfully be killed each year by fisheries in the United States.⁸ Such a large number is nowhere near “approaching zero.”

There are several different ways that NMFS can define the “approaching zero” prong of ZMRG. The simplest one would be an actual numerical cap on mortalities and serious injuries. Such a cap to be true to the phrase “approaching zero” would have to be a very low number (i.e. <10). For stocks where T_{ins} is greater than the cap, fisheries would have to reduce mortalities and serious injuries to the level of the cap to be considered at ZMRG. Similarly, in those cases where T_{ins} is lower than the cap, fisheries would have to reduce mortality and serious injury to T_{ins} or below to reach ZMRG. Additionally, the use of the word “approaching” in the statutory language implies movement. In other words, the “approaching zero” prong of ZMRG is not static; it would be ratcheted down closer to zero with each successive year until an actual zero mortality and serious injury rate were achieved. We would support such an approach.

An alternative method by which NMFS could institute the “approaching zero” prong of ZMRG would be to define it as a rate in relation to some other variable. The key of course is choosing the right rate and the right variable. The MMPA ascribes ZMRG to both fisheries and marine mammal stocks. Compare Sections 118(b)(1) and (2), ascribing the ZMRG mandate to specific fisheries, with Sections 118(f)(1) and (2), which ascribe take reduction and ZMRG in terms of specific marine mammal stocks. While the “insignificant levels” prong of ZMRG can only be determined in relation to the status of a given stock, the “approaching zero” prong can be interpreted as applying to either or both of fisheries and marine mammal stocks. In other words, “approaching zero” could be defined as a function of PBR (assuming it were a small enough percentage as to actually “approach zero.”), or alternatively, it could

⁷These numbers come from the Draft 2003 SARs.

⁸This number is derived by summing 10% of the PBR of each marine mammal stock for which a PBR is calculated in the Draft 2003 SARs. Since PBR is not calculated for many stocks given uncertainties in population sizes for such stocks, the total allowable annual mortality and serious injury under this interpretation of ZMRG would actually be far greater than the 5621 animals calculated. For example, an official PBR is not calculated for the harp seal based on uncertainties of the size of the population in U.S. waters. However, using the Canadian “PBR” gives a T_{ins} of 15,600. Adding this to the total T_{ins} for other stocks gives a total allowable annual kill of over 20,000 individuals.

be defined in terms related purely to a given fishery (e.g. being a function of the number of vessels in a given fishery or fishing effort). Perhaps the best way to define it is to use a method similar to that already used by NMFS in the categorization of fisheries for the annual List of Fisheries. In the List of Fisheries, NMFS uses a two-tiered analysis to categorize fisheries. In the first-tier analysis, NMFS sums up the mortality and serious and serious injury to a given marine mammal stock, to determine if such impact is greater than 10% of PBR. This analysis is comparable to an “insignificant levels” analysis. If such take exceeds 10% of PBR, NMFS moves on to a tier-two analysis. However, if such take is below 10% of PBR, each fishery is classified as Category III and that is the end of the analysis. NMFS’s tier-two analysis determines whether or not each individual fishery’s annual incidental mortality and serious injury exceeds 1% of PBR, and if so, the fishery is classified as Category I or II depending on the levels of take. Because the threshold of tier-two analysis is so low (1% of PBR) this analysis could be considered to comply with the “approaching zero” prong of ZMRG. However, to comply with the ZMRG requirement that mortality and serious injury be both at “insignificant levels” and “approaching zero,” NMFS’s would have to carry out tier-two analysis on all fisheries, including those classified as Category III by tier-one analysis, to determine if mortality and serious injury exceeds 1% of PBR (i.e. approaches zero). In other word, even if the impacts on a given marine mammal stock of all fisheries combined was below T_{ins} (i.e. insignificant levels), a fishery would not be at ZMRG unless it also individually was responsible for annual mortality and serious injury of no more than 1% of PBR. Such an analysis would be straightforward to carry out, and fully implement the requirements of ZMRG.⁹

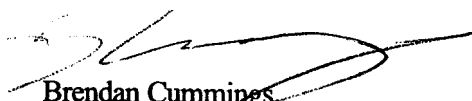
In sum, we believe that ZMRG should be defined by regulation such that it has the full mandatory legal effects contemplated by Section 118(b)(1) of the MMPA. The economic and technical feasibility of a given fishery reducing its incidental mortality and serious injury to insignificant levels approaching zero should not be considered in determining if ZMRG has been reached for that fishery. In defining ZMRG, NMFS must give full effect to both portions of the statutory command; mortality and serious injury should be reduced to “insignificant levels,” and mortality and serious injury should also be reduced to a rate “approaching zero.” An appropriate definition of “insignificant levels” is a combined annual rate of mortality and serious injury from all fisheries of less than 10% of PBR for each marine mammal stock. An appropriate definition of “approaching zero” would be a very low numerical cap (<10) of combined annual mortality and serious injury from all fisheries for each marine mammal stock. Alternatively, “approaching zero” could be defined as the annual rate of mortality and serious injury from each fishery being less than 1% of PBR for each marine mammal stock. In either case, both the “insignificant levels” and “approaching zero” criteria would have to be met before NMFS could consider any fishery to have reached ZMRG.

Thank you for the opportunity to comment. We look forward to shortly seeing a proposed rule defining ZMRG that properly incorporates or adequately responds to the suggestions raised in this

⁹If NMFS adopts such a two tiered approach to determining if ZMRG is reached, fisheries currently classified as Category III which have mortality and serious injury rates between 1-10% of PBR should be reclassified as Category II. This would require a change in the regulations at 50 C.F.R. § 229.2.

comment letter and otherwise complies with the MMPA and the ESA and all other applicable law. If you have any questions please do not hesitate to contact me at the address and phone number listed in the letterhead.

Sincerely,



Brendan Cummings,
Attorney, CBD